



FEDERAL ELECTION COMMISSION

Washington, DC 20463

MEMORANDUM

TO: The Commission

FROM: Office of the Commission Secretary *LC*

DATE: July 17, 2024

SUBJECT: AOR 2024-07 (Team Graham) Comment from Elias Law Group

Attached is AOR 2024-07 (Team Graham) Comment from Elias Law Group..

Attachment

RECEIVED

By Office of the Commission Secretary at 8:03 am, Jul 17, 2024



250 Massachusetts Ave NW, Suite 400 | Washington, DC 20001

July 15, 2024

BY ELECTRONIC MAIL DELIVERY

Federal Election Commission
1050 First Street NE
Washington, D.C. 20463
ao@fec.gov

Re: Comment on Advisory Opinion Request 2024-07 (Team Graham)

Dear Commissioners:

We submit this comment to the Federal Election Commission (the “*Commission*” or “*FEC*”) on behalf of DSCC and DCCC (the “*Committees*”) in response to the Advisory Opinion Request (the “*Request*”) that was submitted by Senator Lindsey Graham’s principal campaign committee (the “*Requestor*”).¹ As explained below, the advisory opinion request poses a hypothetical situation involving an unknown independent expenditure only committee (a “*Super PAC*”), and would allow (a) impermissible coordination and (b) a Super PAC that raises outside the source restrictions and contribution limits of the Federal Election Campaign Act of 1971, as amended (the “*Act*”), to pay for joint fundraising expenses, in violation of the Act and Commission regulations.

BACKGROUND

Requestor proposes to form a joint fundraising committee that would include Requestor, Senator Graham’s leadership PAC, the NRSC, and a Super PAC.² Among other things, the Requestor states that the joint fundraising committee will distribute public communications such as solicitations, invitations, and similar fundraising event announcements in connection with joint fundraising activities.³ The Request states that Senator Graham, his agents, or the Requestor, “may be materially involved in the creation, production, or distribution of these materials” and that such “materials may be created, produced, or distributed after one or more substantial discussions about the communications with Senator Graham or his agents and/or the [Requestor] or its agent.”⁴ The Request further states that the joint fundraising participants may share data and other information

¹ Advisory Opinion Request 2024-07 (“AOR”).

² *Id.* at 1.

³ *Id.* at 2.

⁴ *Id.* at 3.

and “may coordinate scheduling logistics . . . regarding appearances at joint fundraising committee events.”⁵

LEGAL ANALYSIS

A. The Request Does Not Qualify as a Complete Advisory Opinion Request

Commission regulations state that “written advisory opinion requests shall set forth a specific transaction or activity that the requesting person plans to undertake or is presently undertaking and intends to undertake in the future.”⁶ Requests that present a “general question of interpretation,” poses a “hypothetical situation,” or concerns the “activities of third parties” do not “qualify as advisory opinion requests.”⁷

The Request does not meet these requirements. It does not identify which Super PAC will be joining the joint fundraising committee. In fact, the Commission has no information about this proposed Super PAC. For instance, the Request does not state whether the Super PAC already exists or whether it is being set up solely to participate in this joint fundraising committee. Further, there is no information about the Super PAC’s communication plans outside of the joint fundraising committee’s communications. Similarly, the Request does not state whether the Super PAC accepts corporate or labor union funds. This lack of specificity indicates that the Request is merely “posing a hypothetical situation”⁸ that “does not qualify as a proper advisory opinion request.”⁹ Accordingly, the Commission should reject the advisory opinion request.

B. The Request Does Not Contain any Safeguards to Prevent Coordination on the Super PAC’s Other Public Communications

Additionally, if approved, Requestor’s proposed activity would lead to impermissible coordination. The Requestor claims that Senator Graham, his campaign, and any agents will not engage in conduct that will satisfy the request or suggestion, substantial discussion, or material involvement conduct standards under the Commission’s coordinated communications regulations with respect to the Super PAC’s other public communications.¹⁰ However, there is **no similar**

⁵ *Id.*

⁶ 11 C.F.R. § 112.1(b).

⁷ *Id.*

⁸ 11 C.F.R. § 112.1(a).

⁹ Fed. Election Comm’n Adv. Op. 2004-13.

¹⁰ Specifically, the Request states:

- “Senator Graham, the Committee, or any agent of the foregoing will not request or suggest that the Super PAC make any public communications aside from the joint fundraising solicitations, invitations, and similar fundraising event announcements.” *Id.* at 3.

representation with respect to the NRSC.¹¹ Further, despite the conclusory representations in the Request, it appears that the Super PAC will be in a position to acquire and use information about the plans, projects, activities or needs of Senator Graham, other federal candidates, and the NRSC. To be sure, the Request does not provide *any facts* that would prevent the Super PAC from obtaining and/or using material, nonpublic candidate, campaign, or party information to create, produce, or distribute any of its other public communications.

For example, there is no mention of the Super PAC adopting and implementing any protocol that could protect against any unlawful coordination. There is no discussion of how the Super PAC would block the flow of material nonpublic candidate and party information, including plans, projects, activities, or needs of either, from reaching staff working to create, produce, and distribute the Super PAC's other public communications. In fact, because there is no information about the Super PAC, it could be the same staff working on both the joint fundraising communications and the Super PAC's other public communications. Further, these coordination concerns cannot be resolved by relying on representations from the Requestor, or even the NRSC. Only the specific Super PAC involved can represent the facts as applied to it. However, because the Super PAC has not been identified, this standard cannot be satisfied. Accordingly, the Commission should not approve this request because, as described, there are no steps being taken to prevent coordination between the Requestor and NRSC and the Super PAC.

C. The Act and Commission Regulations Prohibit the Use of the Super PAC's Funds to Pay for Joint Fundraising Ads and Expenses

The Request states that any joint fundraising communications “will be allocated to and paid for proportionally by the participants in the joint fundraising committee.”¹² Given this statement, it appears that the Requestor anticipates that the Super PAC will advance or otherwise pay its share of expenses, including the costs to run the joint fundraising committee's public communications. Such a proposal would not comply with the Act or Commission regulations because the Super PAC is not permitted to advance *any* funds to Requestor, the leadership PAC, or NRSC.

Commission regulations provide that joint fundraising committees “may establish a separate political committee to act as the fundraising representative for all participants.”¹³ This separate committee “shall collect contributions, pay fundraising costs from gross proceeds and from funds

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- “Senator Graham, the Committee, or any agent of the foregoing will not be materially involved in the creation, production, or distribution of any Super PAC public communication aside from the joint fundraising solicitations, invitations, and similar fundraising event announcements.” *Id.*
 - “Senator Graham, the Committee, or any agent of the foregoing will not engage in substantial discussion(s) about any Super PAC public communication aside from the joint fundraising solicitations, invitations, and similar fundraising event announcements described above.” *Id.*

¹¹ The Commission's coordination regulations apply to party committees. *See* 11 C.F.R. § 109.21(b)-(d).

¹² AOR at 4-5.

¹³ 11 C.F.R. § 102.17(b)(1).

advanced by participants and disburse net proceeds to each participant.”¹⁴ The joint fundraising representative “shall establish a separate depository to be used solely for the receipt and disbursement of the joint fundraising proceeds. All contributions deposited into the separate deposit account **must be permissible under the Act.**”¹⁵ Commission regulations further state that if one or more participants “can lawfully accept contributions that are prohibited under the Act, the participants may either establish a second depository account for contributions received from prohibited sources or they may forward such contributions directly to the nonfederal participants.”¹⁶ When allocating expenses and distributing proceeds of participating committees that are not affiliated, 11 C.F.R § 102.17(i) provides, in relevant part:

(A)The fundraising representative shall calculate each participant’s share of expenses based on the percentage of the total receipts each participant had been allocated. If contributions from sources prohibited under the Act have been received and distributed under 11 CFR 102.17(c)(6)(iii), those contributions need not be included in the total receipts for the purpose of allocating expenses under this section. To calculate each participant’s net proceeds, the fundraising representative shall subtract the participant’s share of expenses from the amount that participant has been allocated from gross proceeds.

(B) A participant may only pay expenses on behalf of another participant subject to the contribution limits[.]¹⁷

Although the regulations would allow for one joint fundraising participant to pay expenses of the joint fundraising committee and seek reimbursement from the other participants, it would be an impermissible advancement for the Super PAC to pay any of the expenses of the joint fundraising committee. Any costs advanced by the Super PAC would be authorized expenditures of the joint fundraising committee. As an authorized committee of a federal candidate,¹⁸ the joint fundraising committee is prohibited from spending funds that are not subject to the source restrictions and contribution limits of the Act.¹⁹ And it does not matter whether the funds are paid directly from the joint fundraising committee or a participant on behalf of the other joint fundraising participants. All of the expenses constitute expenditures of the joint fundraising committee.²⁰ Thus, the Super PAC is completely prohibited from making any advances to or for the joint fundraising representative, which is considered an authorized committee of Senator Graham.²¹

¹⁴ *Id.*

¹⁵ 11 C.F.R. § 102.17(c)(3)(i).

¹⁶ 11 C.F.R. § 102.17(a)(1)(i).

¹⁷ 11 C.F.R. § 102.17(c)(7).

¹⁸ 11 C.F.R. § 102.17(a)(1)(i); 52 U.S.C. § 30101(6).

¹⁹ *See* 52 U.S.C. § 30125(e).

²⁰ *See* 11 C.F.R. § 102.17(b), (c)(7).

²¹ *See* 52 U.S.C. §§ 30101(6), 30125(e); 11 C.F.R. § 102.17(a)(1)(a).

Because the Super PAC would be prohibited from using its account to advance any funds to pay for **any** expenses associated with the joint fundraising committee, and the joint fundraising committee cannot spend any funds advanced from the Super PAC, the costs of all joint fundraising ads and other expenses must be paid for by the joint fundraising committee, with funds raised directly into the joint fundraising committee itself that are comprised of funds that comply with the source restrictions and contribution limits of the Act, and from legal advances from only the Requestor, NRSC, and Senator Graham's leadership PAC.

The Commission should explain that this proposal, as contemplated by the Requestor, is impermissible under the law. The Super PAC is not permitted to advance any funds to pay for any joint fundraising expenses to or on behalf of the joint fundraising committee and the joint fundraising committee cannot spend any funds that are advanced by the Super PAC. Because the proposed arrangement cannot satisfy these requirements, the Commission cannot approve the request as proposed.

CONCLUSION

The Request presents a hypothetical situation and would permit impermissible coordination on the Super PAC's non-joint fundraising public communications. In addition, the Request seeks to allow the Super PAC to pay expenses and costs of the ads for or on behalf of the joint fundraising committee using funds that are not subject to source restrictions or contribution limits. This proposal is impermissible. The Commission should not approve the request as proposed.

Sincerely,



Rachel L. Jacobs
Jonathan Peterson
Counsel to DSCC and DCCC